In the Supreme Court
OF THE
United States

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OCTOBER TERM, 1944

No. 673

CALIFORNIA SHIPBUILDING CORPORATION (a corporation),
Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and BELLE REBECCA GADDIS,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal of the State of California,
Second Appellate District, Division Three
and
BRIEF IN SUPPORT THEREOF.

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To the Honorable Harlan Fiske Stone, Chief Justice of the Supreme Court of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision (Rec. 169) of the District Court of

Appeal of the State of California, Second Appellate District, Division Three, in the case entitled California Shipbuilding Corporation (a corporation), Petitioner, vs. Industrial Accident Commission of the State of California and Belle Rebecca Gaddis, Respondents (1 Civil No. 14,287 upon the records of said Court). (That Court will hereinafter be referred to as the "District Court of Appeal").

In this cause, your petitioner sought a writ of review to annul an award of respondent Industrial Accident Commission granting in favor of the applicant before it (Respondent Belle Rebecca Gaddis) a sum of money for alleged serious and wilful misconduct by your petitioner in connection with the death of her husband, an employee. (Rec. 2).

Proceedings for such writ of review of a decision of the Industrial Accident Commission are provided for by the Statutes of California and in the Constitution of the State of California.

Labor Code of California, Sections 5950-5956;
Constitution of California, Article XX, Section 21.

Thereafter, as permitted by California law,
Constitution of California, Article VI, Section 4c,
your petitioner applied to the Supreme Court of California for a hearing of said cause. This petition was denied, with two of the seven members of that Court voting in favor of a hearing. (Rec. 177). On the 31st day of July, 1944, a remittitur was issued by the District Court of Appeal after advice of the ruling of the

Supreme Court in denial of a hearing, although the remittitur is dated July 29, 1944. (Rec. 176). Within the three months' period following the date upon the remittitur, this Court has granted an extension of time within which to file this petition and the accompanying record.

Your petitioner has thus exhausted its remedy in the courts of last resort in the State of California.

THE OPINION UNDER REVIEW.

The opinion of the District Court of Appeal appears in the Advance Sheets of California decisions and may be cited as follows:

> *California Shipbuilding Corporation (a corporation) v. Industrial Accident Commission and Belle Rebecca Gaddis,* 64 A.C.A. 745.

The opinion of the District Court of Appeal also appears in this record. (Rec. 169-176). The portion thereof dealing with the federal question here presented commences at the bottom of page 174 of the printed record.

JURISDICTION.

The jurisdiction of this Court is invoked under that section of the Judicial Code,

28 U.S.C.A. 344, Par. (b),

which reads, in part, as follows:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for

review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *"

THE FEDERAL QUESTION.

Your petitioner asserts that the manner of decision of the Industrial Accident Commission, in the proceeding subjected to review before the District Court of Appeal, did not constitute due process of law and was therefore in violation of the Fourteenth Amendment to the Constitution of the United States. Your petitioner was likewise deprived of due process of law in the District Court of Appeal in that its counsel was not permitted to argue upon the effect of evidence which had just been produced and which counsel, therefore, had no prior opportunity to examine or discuss. (*Infra,* p. 9).

The time and the manner of raising the constitutional question will appear hereinafter. (*Infra,* p. 8). It will be disclosed that the due process clause was availed of as soon as evidence was forthcoming of the method adopted by which the Industrial Accident Commission seemingly decided the case before it.

THE STATUTE CREATING THE COMMISSION.

Constitution of California, Article XX, Section 21,

bestows the power upon the Legislature to establish a system of workmen's compensation and to create, in the words of that section,

> "An administrative body with all the requisite governmental functions to determine any dispute or matter arising under such legislation."

There is an express provision in the constitutional section that

> ". . . all decisions of any such tribunal shall be subject to review by the appellate courts of this state."

In pursuance of the authority thus conferred, the Legislature thereafter created a system of workmen's compensation and established an Industrial Accident Commission to hear and pass upon disputes arising under that Act. These provisions are now incorporated in the Labor Code of California.

Labor Code of California, Section 110 et seq.

The Industrial Accident Commission consists of three members.

Labor Code of California, Section 111.

A STATEMENT OF THE MATTER INVOLVED.

After obtaining the statutory death benefit for the death of her husband (Rec. 70-71), Belle Rebecca Gaddis, respondent herein, filed an "Application for Adjustment of Claim for Serious and Wilful Miscon-

duct on the Part of the Employer". (Rec. 71-72). The law of California permits the increase of the award to the extent of one-half, but not exceeding $2,500.00, where the employee has been injured or killed "by reason of the serious and wilful misconduct" of the employer or certain designated subordinates.

Labor Code, Section 4553.

Hearings upon the application were thereafter held before a Referee of the Commission. (Rec. 72-148). Findings and Award were made in favor of the applicant granting her a money payment in the sum of $2,500.00. (Rec. 148-150).

Your petitioner thereafter applied for a rehearing, as provided for by Statute. (Rec. 151-153).

Labor Code, 5900-5910; Stats. of Cal. 1937, Ch. 90.

On August 25, 1943 the Commission made its order denying the rehearing. (Rec. 154).

Then followed the petition to the District Court of Appeal for a writ of review. (Rec. 1-26). An examination of that petition will disclose that the petitioner argued at length that there was no showing whatever that the alleged serious and wilful misconduct was a proximate cause of the accident. (Rec. 19-23). We realize that reproduction of that argument, at any length, would not aid in the solution of the question presented by this petition. However, to establish the substantial nature of the petitioner's application, and the seriousness of the violation of the due process

clause, we trust that brief comment, hereinafter, will be in order as to the substance of the evidence introduced before the Commission. (*Infra,* p. 11.)

On December 15, 1943, the District Court of Appeal issued its Writ, requiring a certification from the Industrial Accident Commission of the record in the Gaddis proceeding. (Rec. 61-62). It is important to note that the Writ called for production from the files of the Commission of various memoranda prepared by the referee who conducted the hearing and by the so-called "reviewing referee" who considered the Petition for Rehearing.

At the oral argument of the cause before the District Court of Appeal, it was ascertained that the documents mentioned above, and called for by the Writ, had not been included in the return. This is evidenced by the order of the District Court of Appeal, under date of April 14, 1944, providing for augmentation of the record, with these documents specified more particularly than in the Writ. (Rec. 155-156). The various memoranda called for by the latter order are set forth at pages 157 to 168 of the printed record and will be summarized at a later point. (*Infra,* p. 12).

As will be shown, these memoranda in no wise stated or recapitulated any of the evidence on the all-important issue of proximate cause. The blanket adoption of the mere general conclusions of these memoranda by the members of the Commission created one inescapable result: the respective referees simply acted as Commissioners themselves.

The memorandum by Clell H. McCredie, Reviewing Referee, is of particular importance. (Rec. 158-159).

Introductory to the consideration of the latter, it is significant to observe that which the District Court of Appeal has found as a fact, with reference to the practice adopted generally by the Commission and utilized in the matter at bar. The opinion of the District Court of Appeal states (Rec. 175):

> "It is the practice of the Commission to submit an application for rehearing to a referee other than the one who conducted the hearing and recommended an award, and the practice was followed in this case. The reviewing referee made a memorandum recommending denial of the petition for rehearing. * * * The commissioners' order denying a rehearing was based upon this report and recommendation. *While the report did not include a summary of the evidence,** it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were established by the evidence, and *it stated as an ultimate fact that the employee's fall resulted proximately from the defective staging.*"

THE TIME AND MANNER OF RAISING THE FEDERAL QUESTION.

As the opinion of the District Court of Appeal recites, the original return, in failing to include the documents called for, was insufficient because the petitioner "challenged the competency" of the Commissioners, "since they had not heard the evidence and were not shown to have had knowledge of it." (Rec. 175).

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*Emphasis throughout is ours.

At the session of the District Court of Appeal when the order in augmentation of the record was made (Rec. 155-156) and when knowledge to counsel for your petitioner was available, for the first time, as to the manner in which this case seemingly had been adjudicated by the Commission, counsel for your petitioner offered to point out for the benefit of that Court, the deficiencies in these reports and memoranda and the consequent denial of due proces of law through their attempted utilization by the Commissioners in making a purported decision and order in the first instance and in the further order in denial of the rehearing. However, the District Court of Appeal then and there ruled that these reports and memoranda would be received in augmentation of the record without argument or comment by counsel.

It thus appears that the recital in the order of the Commission—that the members of the Commission had "reviewed" "the record"—is not correct. (Rec. 154, fol. 246). The District Court of Appeal has determined that they did not do so. (Rec. 174, fol. 272).

In the Petition for Hearing by the Supreme Court, after decision by the District Court of Appeal, counsel for your petitioner called attention to the failure of the Commission to have before it any record or anything amounting to a memorandum or summary on the issue of proximate cause. (Par. XXIV; Rec. 186). A certified copy of the Petition for Hearing in the Supreme Court, together with the points and authorities accompanying the same, is transmitted as a part of this record. The points and authorities just referred to are submitted simply for the purpose of

showing that the petitioner argued the violation of the due process clause to the court of last resort in California. (Rec. 191-192; 199-202).

THE METHOD OF DECISION HERE ADOPTED BY THE INDUSTRIAL ACCIDENT COMMISSION DOES NOT CONSTITUTE DUE PROCESS OF LAW.

The due process clause has been violated both in the original decision and in the decision of the Commission in denial of the rehearing. The deficiencies of all the memoranda, to enable the Commission lawfully to act, will presently be disclosed.

THE METHOD OF DECISION HERE ADOPTED BY THE DISTRICT COURT OF APPEAL LIKEWISE DOES NOT CONSTITUTE DUE PROCESS OF LAW.

We have heretofore called attention (*Supra,* p. 9) to the method of disposition of this constitutional question by the District Court of Appeal. The documents originally ordered to be produced were finally extracted from the Commission by a further order in augmentation of the record after the case had been argued theretofore. The District Court of Appeal declined to give opportunity to counsel to argue upon the deficiencies in the referee's memoranda and the consequent violation of the due process clause, when the documents became first available to petitioner's counsel, and after he had first had an opportunity to examine them. This, in itself, was not due process of law. Your petitioner so contended in the Petition for Hearing in the Supreme Court. (Par. XV; Rec. 183, fol. 278).

THERE WAS AN ISSUE, VIGOROUSLY CONTESTED, AS TO WHETHER THE ALLEGED SERIOUS AND WILFUL MISCONDUCT WAS THE PROXIMATE CAUSE OF THE DEATH.

The opinion of the District Court of Appeal itself demonstrates the woeful inadequacy of the attempted showing of any proximate cause of the alleged serious and wilful misconduct in bringing about the death of Mr. Gaddis. All that the evidence showed is adequately summarized in the opinion of the District Court of Appeal (Rec. 171, fol. 268):

> "At about 7 p.m. Gaddis announced to Morkal that he was going to get a drink of water. He started toward the ladderway, ostensibly to go to the ground where the fountain was located. A few minutes later Morkal saw him 'on the end of the scaffold where there was no scaffolding any further'; when he looked again Gaddis had disappeared. He had fallen to the ground level into a bin of stanchions at a point 10 or 15 feet from the ladderway and directly beneath the unfinished section of the platform. *No one saw the start of his fall and there was no direct evidence as to the cause of it.*"

To assume that Gaddis fell because of the insufficient scaffolding at the point (in question) away from the place where he had been working is to assume that he took an unsafe course when a safe one was available to him. As was also recited in the opinion of the District Court of Appeal. (Rec. 170, fol. 268):

> "Gaddis and a fellow workman, Morkal, had reached the sixth level, which was approximately 40 feet high, by means of a ladderway which led to a 24-inch catwalk above the sixth level, from which they had climbed down to the platform where they were working."

That the proximate cause flowing from the alleged serious and wilful misconduct existed in this case could only be the result of guess, suspicion and conjecture. Moreover, to decide that issue in the affirmative required the rejection of the presumption that one takes due care of his own safety. This presumption exists in California and in all other jurisdictions.

Code of Civil Procedure of California, Section 1963 (4);

Smellie v. Southern Pacific Company (1931), 212 Cal. 540, 299 Pac. 529;

31 *C.J.S.* (Evidence), p. 772, sec. 35.

Your petitioner argued before the Commission and before the District Court of Appeal of the insufficiency of the evidence, as a matter of law, to establish proximate cause. We recognize that this issue is no longer available on the Federal question herewith submitted. Nevertheless, the obvious merit of our position points to the necessity that the Commissioners should have been fully advised as to the details and nature of actual evidence on that issue.

IN VIEW OF THE PRESENCE OF THE STRONGLY CONTESTED ISSUE OF PROXIMATE CAUSE, THE REPORTS AND MEMORANDA IN THE HANDS OF THE MEMBERS OF THE COMSION WERE WHOLLY INSUFFICIENT.

The award of the Commission with respect to the alleged serious and wilful misconduct was rendered June 24, 1943. (Rec. 150, fol. 238a). An order to transcribe the testimony was not made until July 13, 1943.

(Rec. 153, fol. 245). It cannot be questioned, therefore, that the members of the Commission did not have before them the transcript of testimony when signing the original award.

The memorandum of the Hearing Referee appearing at pages 159 to 160 (fol. 255 et seq.) of the printed Record is wholly devoid of any reference to the issue of proximate cause or to the evidence pertinent thereto, except for the bare conclusion (Rec. middle of p. 160): "I felt that the testimony very definitely established that the injury and death were proximately caused by the serious and wilful misconduct of the employer." No discussion of the state of the record on that issue is included in the memorandum, and he therefore submitted to the members of the Commission nothing but his own bald conclusion.

Likewise, the additional memorandum of the Hearing Referee, in which he purports to summarize the testimony of certain witnesses, is wholly devoid of any showing, or discussion, upon the subject of proximate cause. (Rec. 161-165, fol. 257 et seq.). The same is true of the Hearing Memorandum made on March 8, 1943. (Rec. 165-167, fol. 261 et seq.).

It cannot be denied that the Hearing Referee decided this case, not the members of the Commission. They had before them nothing upon which they could have decided it.

In the petition for rehearing, the so-called Rehearing Referee was faced with the contention that there was no proof of proximate cause, and made reference

to that contention at the inception of the memorandum. (Rec. middle of p. 158). His only attempt to dispose of the question of proximate cause was in these words (Rec. middle of p. 159):

> "The accident occurred after dark. There was no immediate eye witness to the fall but from the evidence it appears reasonable to believe that, due to the poor lighting which was shown to have existed, applicant fell thru one of the gaps in the planking of the scaffold over which he had to pass. From this it appears that the violation was the proximate cause of the death which, in my opinion, completes the case of serious and wilful misconduct."

There was no reference to the testimony of any named witness, the number of lights, the extent of lighting, or any summarization of the testimony. Incidentally, the record will be searched in vain for any testimony showing the lack of sufficient lighting.

Finally, the manner of adjudication by the Rehearing Referee assumes that the deceased took a route which by no means appeared to be his actual route.

Thus it is also true that the Rehearing Referee passed upon and decided the petition for rehearing—not the members of the Commission. Again, they had before them nothing upon which they could have based an independent decision.

REASONS FOR GRANTING WRIT OF CERTIORARI.

1. The issuance of this writ will enable this Court to decide a question of exceeding importance, as more particularly shown by the brief accompanying this petition.

2. As also disclosed by the brief, the respondent Commission disregards the decisions of this Court in the two *Morgan* cases. The decision of the District Court of Appeal likewise fails to apply the doctrine of the *Morgan* decisions—and those decisions govern the facts here appearing.

3. The procedure adopted by the Industrial Accident Commission in this case and in all of the others before it does not meet the simplest requirements of due process of law.

WHEREFORE, petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the District Court of Appeal of the State of California, Second Appellate District, Division Three, for a review by this Honorable Court of the proceedings in said District Court of Appeal in the case numbered and entitled in its docket 2 Civil No. 14,287, California Shipbuilding Corporation (a corporation), Petitioner, vs. Industrial Accident Commission of the State of California and Belle Rebecca Gaddis, Respondents, and petitioner further prays that upon such review the decision of said District Court of Appeal be set aside and reversed and that said Court be instructed by your Honorable Court to issue its judgment and decision annulling and vacat-

ing said award made by Respondent Commission and that your petitioner have such other and further relief as may be meet, proper and equitable in the premises.

Dated, San Francisco, California,
November 10, 1944.

MAX THELEN,
GORDON JOHNSON,
Counsel for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

FOREWORD.

With the growth in the activities of administrative boards, it is more important than ever that this Honorable Supreme Court of the United States declare that which constitutes due process in their procedure. Delegation of functions and a shifting of responsi-

bility are now arising in these tribunals to such extent that in but few instances is a decision gained from those whose duty it is to render the decision. Supernumeraries and monitors are permitted actually to decide by making oral and written reports in such vague manner that the members of the Commission itself cannot reach any real decision and the latter could well employ the proverbial rubber stamp in affixing signatures.

This method of functioning does not pertain exclusively to the Industrial Accident Commission of the State of California; we venture to say it is common to a vast majority of boards, commissions, departments and officials throughout the land, both State and Federal.

This case can well be a landmark in the field of administrative law. Not often has a litigant the good fortune to ascertain the hidden routine by which a matter is disposed of in an administrative or quasi-judicial tribunal. Grudgingly surrendered to the Court, as the petition here discloses, were the files—styled by the respondent Commission, as "confidential and secret"—by which the process of adjudication was delegated and surrendered. The members of the Commission, in whom the duty of deciding was imposed, had nothing before them by which to make a real decision—they had neither the record nor any intelligent summary of the record on the vital issue in the proceeding.

We, of course, do not contend that the members of the Commission must personally preside over every

hearing. What we maintain is that when deciding a case—and the law fixed upon them the duty to decide—they must have some basis upon which to decide, other than a mere recommendation upon the part of a subordinate, which they can blindly either adopt or reject. In the language of

> *Morgan v. United States* (1936), 298 U.S. 478, 481, 80 L. Ed. 1288, 1295,

a case presented hereinafter,

> "The one who decides must hear."

Anything less than this cannot be due process of law.

It has been appropriately said that the Industrial Accident Commission, in ruling upon a controversy arising under the Workmen's Compensation Act, performs a judicial function and in legal effect sits as a Court.

> *Pacific Coast Casualty Co. v. Pillsbury,* 171 Cal. 319, 322, 153 Pac. 24, 26;
>
> *Western Metal Supply Co. v. Pillsbury,* 172 Cal. 407, 411, 156 Pac. 491, 493, Ann. Cas. 1917E 390, 394.

The inquiry as to whether procedural due process of law has here occurred is to be approached with that true conception of the Commission's functions.

I.

THE HOLDING OF THE DISTRICT COURT OF APPEAL THAT DUE PROCESS OF LAW WAS AFFORDED TO YOUR PETITIONER IS CONTRARY TO THE DECISIONS OF THE UNITED STATES SUPREME COURT IN THE TWO APPEALS IN THE MORGAN CASE.

When it became apparent that the Industrial Accident Commission had assumed to decide this case in the manner set forth in the petition for this writ, the two decisions,

> *Morgan v. United States* (1936), 298 U.S. 468, 80 L. Ed. 1288,

and

> *Morgan v. United States* (1938), 304 U.S. 1, 82 L. Ed. 1129,

were cited to the Supreme Court of California and two of the seven justices were sufficiently impressed that they voted in favor of granting the petition for hearing solely upon the ground of the absence of due process of law.

We deem the *Morgan* cases so closely in point that a thorough analysis of them, with comparison to this proceeding, is (we trust) justified.

The bills of complaint in the *Morgan* case sought to restrain the enforcement of a rate order issued by the Secretary of Agriculture. That official, under the Packers and Stockyards Act, was empowered to fix reasonable rates, after a hearing, for the buying and selling of livestock.

The bills of complaint alleged that the Secretary of Agriculture had not heard or read the evidence and

that his only source of information was through private consultation with the employees of the Department of Agriculture. The record showed that the testimony had been taken before an Examiner.

On motion of the Government, these allegations were eliminated from the bills of complaint and injunctive relief was denied.

The Supreme Court of the United States ordered reversal. This Court held that the foregoing allegations were effective in showing an absence of due process of law.

This Court held in the first instance that the proceeding required the taking and weighing of evidence, determinations of fact based upon the consideration of evidence and the making of an order supported by findings as to the facts and that hence it was a proceeding of a "quasi-judicial character."

The Court then stated (298 U.S. 480, 80 L. Ed. 1295):

> "The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument. *If the one who determines the facts which underlie the order has not considered evidence or*

*argument, it is manifest that the hearing has not been given.''**

The Court stated further (298 U.S. 481, 80 L. Ed. 1295):

> "It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. **The one who decides must hear.**''

At the point following the language which has just preceded, the opinion concedes that evidence may be taken by an Examiner and may be sifted and analyzed by competent subordinates. The Court added (298 U.S. 481, 80 L. Ed. 1295):

> "But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.''

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*Emphasis throughout is ours.

As the Court points out (298 U.S. 481, 80 L. Ed. 1295), to permit one official to examine the evidence, and another official to make the findings and order does not necessarily comprehend that the latter will adopt the recommendation of the former. What, in such instance, has become of any conception of a "hearing"? And if the latter official may overrule, without knowledge of the evidence, what sanctity is there in an adoption of the recommendation under the same circumstances?

After the reversal ordered by the first *Morgan* decision, the cause proceeded to trial. It is interesting to note that a showing was made at the trial of the process of decision by the Secretary of Agriculture quite similar to the showing of the routine of the Industrial Accident Commission in the matter at bar, although the proof made at the *Morgan* trial was probably further in the direction of due process than we have here.

This appears in the statement of facts in the second *Morgan* decision.

> *Morgan v. United States* (1938), 304 U.S. 1, 82 L. Ed. 1129.

The Secretary of Agriculture testified that the evidence had been taken before he took office—that he did not hear the oral argument—that the record was placed on his desk and "he dipped into it from time to time to get its drift"—he examined the briefs opposed to the Government—he conferred with the officials of the Department of Agriculture—he "con-

sidered the evidence before signing the order"—and he concluded with the statement that the substance of his action was his "independent conclusion" based on the findings of his subordinates and represented his "own independent reactions." (304 U.S. 17, 82 L. Ed. 1132).

The District Court held, upon the basis of this testimony, that the hearing was adequate and that the Secretary's order was lawful.

Judgment for the Government was again reversed by the Supreme Court of the United States in this, the second *Morgan* decision. This Court held that even in the presence of the testimony to which we have referred there had been no adequate hearing and due process of law had not been observed.

This Court ruled that it still remained that the Secretary was not sufficiently informed because the appellants had never been given the opportunity to meet the reports prepared by the subordinates or to argue upon them.

The Government argued upon the second *Morgan* appeal that the Court in its first decision had confirmed the practice of taking testimony before an Examiner. This Court ruled that its language in the prior opinion did not mean that the Secretary could remain uninformed as to the real contents of the record or that *ex parte* discussion was the substitute. (304 U.S. 21, 82 L. Ed. 1134).

We observe the closest analogy between the two *Morgan* decisions and the matter at bar. In fact, the

steps taken in the *Morgan* case more closely approached due process than in the matter at bar. As appears from the testimony of the Secretary of Agriculture, he had far more knowledge of the record than possessed of this record by any member of the Industrial Accident Commission.

II.

THE GROUND UPON WHICH THE DISTRICT COURT OF APPEAL HAS DECIDED THAT DUE PROCESS OF LAW WAS AFFORDED IS AN UNTENABLE ONE.

In ruling upon this Federal question, the District Court of Appeal rests upon the statement that "it would be impossible for the commissioners themselves to review the record or petitions for rehearing and the law does not impose that duty upon them". (Rec. bottom of p. 175).

We do not yield to this statement. Certainly, there is no showing that the Commissioners are unable to pass upon petitions for rehearing in what must be a small proportion of their proceedings—where a claim is made for the statutory penalty arising from alleged serious and wilful misconduct, and where such claim, if successful, will increase the normal award by one-half.

If the reasoning of the District Court of Appeal is to stand, it will mean this: the members of the Commission may refrain from familiarizing themselves with one hundred per cent of their cases. They may

say in each instance that it is impossible for them to devote attention to all of the applications for a rehearing; therefore, they will devote attention to none. Why not afford due process in a certain number of cases, which are the most serious ones, involving death awards and added penalties?

The plaint of the Commissioners—that the duties devolving upon them cannot be performed—seems more fancied than real. As we have seen, the requirement that "he who decides must hear", does not contemplate personal participation by any member of the Commission in the conduct of a session at which testimony is taken. "Hearing" is used in the *Morgan* cases as requiring, at least, through some intelligently prepared summary or report of the evidence, an opportunity by which a member of an administrative board may gain some personal knowledge of the nature and effect of the testimony and other evidence and then make his own independent decision based upon that knowledge.

There would appear to be no reason why the Industrial Accident Commission cannot adopt the practice here suggested.

This Court, in referring to the duty actually to decide, has stated at the conclusion of the last quotation we have made from the second *Morgan* decision (298 U.S. 481, 80 L. Ed. 1295):

> "That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

It has always been recognized that mere expediency is no ground for a departure from the requirements of procedural, due process of law.

As the report of the Attorney General's Committee on Administrative Procedure puts it, reviewed in the concurring opinion in

National Labor Relations Board v. Baldwin Locomotive Works (C.C.A. 3, 1942), 128 Fed. (2d) 39, 63,

if oppressed by too much detail, boards should arrange to divide labor, sit in divisions, or increase their membership. As further stated in that report, even a single department head, when undertaking to review a case, should assume responsibility.

Administrative officials should not be permitted to sit back, refrain from taking these measures and then blandly claim that the rendition of due process is not practical.

The citation by the District Court of Appeal of

Labor Code, Section 115,

providing for reference, is meaningless. The section itself provides for a final decision by the Commission. If construed otherwise, this section would itself deprive of due process in permitting decisions by irresponsible persons appointed at the whim of the Commission, when it is obvious, and has been so recognized in the very procedure here adopted by the Commission, that the real decision, both originally and in passing upon the petition for rehearing, should be by the members of the Commission.

Moreover, and in justice to the Legislature, it is to be noted that all petitions for rehearing are to be submitted to, and decided by, "the Commission."

Labor Code of California, Sections 5900-5910.

III.

FURTHER AUTHORITIES ARE IN ACCORD WITH THE DECISIONS OF THIS COURT IN THE MORGAN CASE.

In

State ex rel. Madison Airport Co. v. Wrabetz (Wis. 1939), 231 Wis. 147, 285 N.W. 584,

it was recognized that there is not due process of law where members of the Industrial Accident Commission assume to review an Examiner's findings without reading a transcript of the evidence, or without otherwise addressing themselves to the evidence. The Court there declined to issue a writ of mandate to correct the record—but did so merely upon the ground that the Commissioners could be made to testify, in the proceeding to review the award, as to what they did or did not do. The decision in the first *Morgan* case was quoted and followed.

In accord:

Kaegi v. Industrial Commission (Wis. 1939), 285 N.W. 845.

Similarly, in

Joyce v. Bruckman (N.Y. 1939), 15 N.Y. Sup. 679,

it was held that where only one member of the State Liquor Authority heard the evidence on the revoca-

tion of a license to sell liquor, and the other four members of the Board were ignorant of the record, the Board could not act with validity. This decision, likewise, was based upon the first *Morgan* decision.

National Labor Relations Board v. Cherry Cotton Mills (C.C.A. 5, 1938), 98 Fed. (2d) 444, 446, holds upon the authority of the *Morgan* cases, that where the National Labor Relations Board delegates authority to hirelings and adopts their suggested findings without inquiry or investigation, the order of the Board is invalid.

See also:

Donnelly Garment Co. v. National Labor Relations Board (C.C.A. 8, 1941), 123 Fed. (2d) 215, 220;

Crow v. Industrial Commission (Utah, 1943), 140 Pac. (2d) 321.

IV.

THE MANNER IN WHICH THIS CASE WAS DECIDED BY THE DISTRICT COURT OF APPEAL LIKEWISE DOES NOT AFFORD DUE PROCESS OF LAW.

As the petition discloses, counsel for your petitioner was denied the right to argue before the District Court of Appeal as to the entire inadequacy of these reports and memoranda when they were belatedly and grudgingly made available and this right was demanded as soon as the record disclosed the manner of so-called decision here adopted.

One of the most important elements in due process of law is in the right to representation by counsel.

Roberts v. Anderson (C.C.A. 10, 1933), 66 Fed. (2d) 874, 878;

16 *C.J.S.* (Constitutional Law) 1267, note 92.

As a consequence of this doctrine, due process is likewise denied where counsel is not given the opportunity to argue upon the merits of the cause. The fact that the case has been previously submitted is no answer, when, through the failure of the respondents to comply with the writ, the documents called for had not been furnished and when produced concurrently with counsel's request to argue concerning them.

As held in the second *Morgan* decision (*supra*) (304 U.S. 18, 82 L. Ed. 1132):

> "The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them. *The right to submit argument implies that opportunity; otherwise the right may be but a barren one.*"

V.

THERE IS THE UTMOST PRACTICAL NECESSITY FOR THE ISSUANCE OF THIS WRIT.

The Industrial Accident Commission of California and various other boards, commissions, officers and tribunals throughout the country continue to disregard the decisions of this Court in the *Morgan* case, where, as we have shown, compliance with the minimum requirements of that case could readily be made.

The constant denial of due process of law by the Industrial Accident Commission of California has become so notorious that a legislative investigation is now under way. The resolution authorizing this investigation was preceded by a resolution, adopted six months before, directing an investigation of all administrative procedure, to be made by the Judicial Council, an official body of the State of California. (Rec. 216-217).

The attitude of the California courts, in confirming the denial of procedural due process of law, is well illustrated in

Taylor v. Industrial Accident Commission, 38 Cal. App. 75.

There, the issue was alleged serious and wilful misconduct upon the part of the employer. It was argued that the Commissioners themselves did not consider or decide the case. Division One of the Second Appellate District held (top of p. 82) that:

> "It is at once apparent that the very object of the statute is to enable the commission to use the report of the referee in its entirety or in part as the basis for a decision or award, or, if dissatisfied with such referee's report, the commission is authorized to resort to the record in the case."

We cannot comprehend any reason why the Commission should be dissatisfied with the report, without first resorting to the record or having in hand some adequate statement of the contents of the record, far more complete than anything appearing in the matter at bar.

In further demonstration of the California courts' misapplication of the rules enunciated in the *Morgan* cases, and the resultant denial of due process of law, let us quote further from the *Taylor* case (middle of p. 82):

> "When the commission adopts the facts found and the decision recommended by the one who is authorized to and does hear the evidence, then the commission is not required to review the record. An entirely different situation would be presented if the commission, disregarding and setting aside the findings and recommendation of the referee, undertook, without a review of the evidence, to appraise the same and make determination based thereon. Such is not the case here presented."

The fallacy of the above holding is, in turn, "at once apparent." According to the opinion in the *Taylor* case, if two are wrong (the referee and the Commission) the Commission need not review the evidence, but if one is right and the other is wrong, then the Commission must review the evidence.

Thus is demonstrated the unfortunate and erroneous attitude of the courts of California toward the vital question of constitutional law here addressed to this Court.

No application for a hearing in the Supreme Court of California was made in the *Taylor* case.

If the writ is not granted in the case at bar, there may never again be an opportunity for the Court to pass upon this question, insofar, at least, as the Industrial Accident Commission of the State of California

is concerned. An authoritative work has recently appeared, written by Warren L. Hanna, a former referee of the Commission. It is there stated,

> *Hanna, Industrial Accident Commission and Procedure,* p. 221:
>
> "There is no rule requiring the Commission to disclose to the reviewing court the intimate character of the consideration which may have been given to a decision by it or its staff. Unless it chooses to do so voluntarily, the petitioner usually finds himself unable to present any evidence to overcome the presumption that official duty has been performed, particularly in respect to decisions signed by the Commission itself. This difficulty of proof is encountered because of—
>
> (1) The lack of any means of affirmatively showing that the Commission reversed the referee, instead of adopting his recommendations;
>
> (2) The lack of any positive means of showing that the Commission has not reviewed the record; and
>
> (3) The lack of any procedural opportunity to present such evidence, even if it were available, since the action of the Commission completes the record to be reviewed by the appellate court."

These practical difficulties have fortunately been overcome in the matter at bar.

We can no more fittingly conclude that in the language of Mr. Justice Cardozo in

> *Ohio Bell Telephone Company v. Public Utilities Commission* (1936), 301 U.S. 292, 304, 71 L. Ed. 1043, 1101,

that the right to a full and fair hearing before a Commission is an "inexorable safeguard" and one of the "rudiments of fair play" and that

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored."

We therefore urge that a writ of certiorari be granted to review this decision of the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Dated, San Francisco, California,
November 10, 1944.

Respectfully submitted,
MAX THELEN,
GORDON JOHNSON,
Counsel for Petitioner.

Office - Supreme Court, U. S.
FILED
JAN 29 1945
CHARLES ELMORE CROPLEY
CLERK

(22)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 673

CALIFORNIA SHIPBUILDING CORPORATION (a corporation),

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and BELLE REBECCA GADDIS,

Respondents.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Comes now the respondent Industrial Accident Commission of the State of California and respectfully submits its brief in opposition to the petition for writ of certiorari filed by petitioner California Shipbuilding Corporation.

Petitioner seeks to review a decision of an intermediate state court of the State of California, which decision affirmed an award of compensation by the Industrial Accident Commission of the State of California to respondent Belle Rebecca Gaddis.

JURISDICTION.

The question presented by this proceeding is undoubtedly within the jurisdiction of the United States Supreme Court. However, as respondent will demonstrate hereinafter, the decision of the state court affirming an award of the State Industrial Accident Commission was in accord with the applicable decisions of the United States Supreme Court and no reason exists for the granting of the writ of certiorari prayed for by petitioner.

THE FACTS.

Jonas Dulpha Gaddis, an employee of the petitioner California Shipbuilding Corporation, was killed in an industrial accident and his widow, Belle Rebecca Gaddis, respondent herein, was awarded normal compensation benefits for his death, which award has never been attacked. (R. 70-71.)

The California Workmen's Compensation Act provides for the increase of such an award by 50%, but not exceeding $2500, where the injury or death of the

employee was caused by the serious and wilful misconduct of the employer.

California Labor Code, Section 4553.

The widow, Belle Rebecca Gaddis, a respondent herein, filed an application for such increased benefits. (R. 71-72.)

After notice, hearings upon this application were held before a referee of the Industrial Accident Commission. (R. 72-148.)

After each hearing was held the referee who presided formulated a report on the evidence adduced at the hearings which report was dictated by the referee to a stenographer, typewritten by her, and considered by the Commissioners of the Industrial Accident Commission before the ultimate decision of the Commission was made in the case. The final reports contain, in addition to the evidence, the recommendation of the referee, as to the determination of the point which was at issue.

Because the basis of the petitioner's complaint against the Commission's decision is petitioner's charge that the Commissioners did not know what the evidence in the case was, we believe it would be helpful to the court to quote here the evidentiary statements contained in these reports, documenting them with references to the actual testimony of the witnesses in this case as it appears in the record.

We ask the court's indulgence for this, since the reports are contained in full in the record. (Pages 156

to 168.) Our reason for restating them is to indicate to the court that, contrary to petitioner's assertions, they do contain an accurate summary of the evidence, which was considered by the deciding body, the Industrial Accident Commission.

We should also remark that as they are set forth in the record, the order of the reports is the reverse of the order in which they were issued. For the greater convenience of the court, we shall set them out in the order in which they were issued, omitting entirely however the earliest (R. 167-168) which related only to the normal award for benefits, irrespective of serious and wilful misconduct, which has not been attacked, and the last report which which merely corrected a clerical error. (R. 156-157.)

Omitting certain information which is contained at the heading of each report for statistical purposes, they are as follows:

"MEMORANDUM ON HEARING ON AMENDED APPLICATION ON SERIOUS AND WILFUL MISCONDUCT.

"(Nothing paid applicant's attorney.)

"*Alex Morkal* testified he was a boilermaker's helper. (R. 73.) That he and the deceased were working on the same scaffolding. (R. 74.) That this was staging on which they were standing bolting up on the outside of the hull. (R. 74.) That they went on the swing shift about 4:30 P.M. (R. 80.) That the scaffolding was about 40 feet up in the air. (R. 60A.) That it was composed of two planks with a safety guard rail, the

planks being about 12 inches in width and but two of them. (R. 77.) That farther down to the right a distance of 48 feet was a stairway which took workmen to the ground. (R. 60A.) That between the landing from the stairway at the forty foot level and the location where the witness and the deceased were bolting up, was a distance of about 16 feet where the planks failed to meet, leaving a straight drop of 10 feet to the next staging or 40 feet to the ground (R. 60A), which was the fall the deceased suffered which ended fatally. Testified it happened at 7 o'clock. (R. 75.) That there were lights there but due to the dimout they couldn't be very bright.* That the deceased told him about 7 P.M. that he was going to get a drink and the witness saw him walk down the plankway toward the stairs which was a distance of about 48 feet, the last 16 or 20 of which was the area of the walkway left open by the failure to carry the planks on across. (R. 75.)

"Testified that he complained to the riggers and other men about this as well as to the foreman, but that nothing had ever been done. (R. 82, 84, 85.)

"*Frank Zaby* testified that he was not on the same ship as the deceased but that he was coming down to get a drink and saw a body falling, it being about 12 feet from the ground at that time. (R. 88.) That he didn't see the staging either then or subsequent. (R. 89.) That he called the first aid station and did what he could to make the deceased comfortable. (R. 89.)

*Morkal's testimony does not support this statement. (R. 86, 87.) However, see the testimony of Zaby. (R. 90.)

"*C. W. Towt,** permanently assigned at CalShip for the past 11 months, was on the day shift, hence not on duty at the time the deceased fell. (R. 91.) Testified that on the morning following the accident he had inspected the rig. (R. 94.) Had found it repaired with all new lumber. (R. 95.) Had on many occasions complained to one Robinson, the rig foreman, about missing planks in scaffolding (R. 94) as had he also done with Peterson who was the assistant director of the CalShip Safety Counsel. (R. 96.) Testified he had spoken to him daily—constantly—about the staging, its bad condition. (R. 98, 99.) Testified also that he had gone around with one John Jago who was in charge of the lumber department for the scaffolding as well as the scaffolding and Jago had made the observation that the lumber conditions and the scaffolding were very bad and that something should be done about it. (R. 97.)

"*Alex Morkal,* recalled (R. 105), testified that the scaffolding had been in that condition since he went to work that night. (R. 107.) That he had walked up the stairs and then had climbed over the hull and around to where he and deceased were bolting up to get on that section of the scaffold. (R. 107.)

Disposition:

"Continued to April 13, 1943, 9:30 a.m. Notice waived.

CLAUD M. DUNN, Referee.

"CMD:er. 3-12-43"

---

*Safety Engineer, State Industrial Accident Commission.

"MEMORANDUM ON FURTHER HEARING AND DECISION.

"George Robinson (for app.) testified he had been employed by the defendant employer since 1941, starting out as a rigger, and then in August, 1942, being made staging rigger foreman. (R. 108, 109.) Testified he was on the day shift; that he had been working on the particular scaffolding herein involved. (R. 109.) Testified that [see Def't Ex. 2 (R. 60A)] in the upright section 'Z', just to the left of the stairway, he had noticed there was only one plank extending the 16' or so feet over to the supporting scaffold, about midway between 'Z' and 'Y'; that in order to prevent employees from turning to the left on that level he had nailed a barrier there [see vertical red mark (R. 60A)]. (R. 112.)

"Testified that running the full length to the left, and toward the stern of the hull, and extending down to the ground, was a scaffold; that this scaffolding was divided into approximate vertical six-foot apart* walkways; that this walkway was 42 or 44 in. wide (R. 111); that workmen in using it would face the hull, but that there was a guard rail behind them. (R. 113.)

"Testified that the particular section of the hull on which the work was being done was on the top level (R. 109, 110); that at the furthermost left-hand end of this scaffold there was no cross bar at all (R. 114); that between 'X' and 'Y' there were two planks 12 in. each in width (R. 111, 60A); that in the area covered

*The testimony of Hart indicates that the walkways were about 6 vertical feet apart. (R. 125.)

by section 'Z' there was only one 12 in. plank. (R. 111, 60A.) Testified that he knew that additional planks were called for by the safety orders, and had ordered one from an expediter, one Westerlund by name. (R. 113, 120.)

"Testified that he had had a number of conversations with the Industrial Accident Commission safety engineer permanently assigned to Calship, C. W. Towt, about the staging conditions; that Towt had spoken to him 'constantly' about the unsafe condition, and that he had done nothing about it. (R. 120, 121, 122.) Also testified that the catwalk extending around the top of the hull was above level No. 6 on which the men were working. (R. 117, 118.)

"Joseph M. Hart (for deft.) testified he is stage rigger foreman (R. 123); for 6 months on the swing shift (R. 123) (which was 4:30 P.M. to 12:30) (R. 123); testified he heard the accident happen just before seven o'clock (R. 123); that it was not dark at that time (R. 123); that the men were working on the top level (R. 124), there being six in all (R. 124), not including the catwalk; that upon hearing there had been an accident he went to the scene and found the body of the deceased in a junk scrap-iron box approximately 10 x 16 ft. (R. 125) in the bin which was on the ground, in part of the area covered by section 'Z' (R. 124); that he did what he could to make him comfortable;* that he thereafter went up and looked over the level where the men had been working (R. 125);

*It was Morkal who so testified. (R. 89.)

that in the section 'X' there were three boards, but that there were no planks, not even one, in the area covered by 'Z'. (R. 127.)

"Testified that the foreman had told him there were three boards required for a walkway (R. 129), and that there were three at the point where the men were working (R. 129); that the distance between where the men were working and the stairs was about 60 ft. (R. 129.)

"Under cross-examination testified he did not know for certain whether in the area covered by 'X' there were two or three planks. (R. 130.)

"Testified that changes were being made in the hooking up of the scaffolding, in view of the advancing work on the boat. (R. 134.)

"Walter H. Pelukharp (for deft.) testified that he is safety engineer for Calship (R. 134); had been there 9 months (R. 134); was on the swing shift (R. 135); knew safety order 1806 (R. 135); had made frequent general yard inspections; knew where the accident occurred; made an immediate investigation of it (R. 135); inspected the construction of the staging (R. 135); that this took approximately three hours (R. 136); that immediately above the end of the planking, at the right of section 'Y', was a thousand watt flood lamp pointed down (R. 136) about three inches above the level of the catwalk, which would have made it about 8 ft. above the level of the walkway (R. 140); that at the immediate foot of the stairway was a drinking fountain. (R. 137.)

"Testified that when he made his examination there were two planks serving as a walkway between 'X' and 'Y', but that in the area covered by the letter 'Z' there were no planks whatever. (R. 138.) Testified that he talked with applicant's co-worker, one Pritchard, approximately 30 minutes later (R. 138); that Pritchard was working with deceased when deceased went to get a drink of water. (R. 138.)

"On cross-examination testified that, although he had been employed as a safety engineer by Calship for approximately nine months, he had prior to that time, for the seven years immediately preceding, been building and construction contractor in Los Angeles (R. 139, 140); that at time of his investigation there was no stop cross bar on level No. 6, where the men were working, to prevent a man from walking off into space (R. 142); that there were no planks extending over that. (R. 142.)

"Nels E. Peterson (for deft.) testified that he was chief safety inspector for Calship since 4-20-42 (R. 144); prior thereto had been employed by Federal Government in same line of work. (R. 144.) Testified he worked under Miller, who was head safety engineer for Calship (R. 144); that he—witness—had fifteen men working under him (R. 145); that I.A.C. inspector Towt would make reports to him as to conditions. (R. 146.) Testified he could not remember that Towt had ever spoken to him personally with regard to the condition of the staging. (R. 146.)

"It was stipulated that if Belle Rebecca Gaddis were called and sworn, she would testify that the watch of the deceased was found stopped at 7:34 p.m. (R. 148.)

"Anent the statement of E. M. Pritchard, co-worker with deceased, both counsel for applicant, as well as counsel for employer, testified they had done everything they could to locate the man, and were unable to do so. It was admitted, therefore, without objection, Pleukharp having testified that the statement was procured from Pritchard by him approximately 30 minutes after the fatal fall. (R. 138, 139.)

"It will be noted in that statement that Morkal, who had previously testified as a witness, stated that after deceased left him with the statement he was going to get a drink it was not more than two or three minutes before information was relayed to the effect that the deceased had fallen.

Disposition:

Submitted.

Discussion:

"Although counsel for applicant had the report of C. W. Towt, I, of course, did not make an order admitting it, or a copy thereof, which is in the correspondence section of the file. The concluding paragraph of that report reads as follows:

> "This accident might have been avoided if warning lights had been placed at the point where the planks were missing and a good barricade had been placed across the defective staging. Pri-

marily the staging should have been completed to standard width of 36 in., as it is apparent that new planks were available in the yard. The company had been repeatedly warned of the prevalence of defective staging, and ordered to correct same.'

"This statement, particularly the warning part thereof, corroborates the testimony of C. W. Towt. In view of the fact that George Robinson testified he had 'constant' conversations with Towt about the unsafe condition of the staging, and in view of the fact that he was a stage rigger foreman, I feel that if this case were held to be otherwise than serious and wilful misconduct that section might just as well be stricken from the act; there would be no reason for its continued existence.

"I am satisfied that the matter is serious and wilful.

Disposition:

"Findings and Award submitted herewith, finding serious and wilful misconduct in the amount of $2500.00, payable at the rate of $12.50 a week; $250.00 attorney's fee.

CLAUD M. DUNN, Referee.

CMD/gr

"N. B. In allowing this attorney fee of $250.00, I would like to say that there was considerable investigation done by this attorney. The case was well put on, in my opinion, and I feel that a fee of anything less than $250.00 would be out of line. The value of the services, in my humble opinion, was in excess of the amount I am allowing.

CMD."

"MEMORANDUM ON ORDER DENYING EMPLOYER'S PETITION FOR REHEARING.

"Dunn, Referee.

"Flange helper, 51, fell, about 40 ft. from a scaffold December 29, 1942 and died as result of the fall on January 2, 1943.

"The widow was awarded maximum death benefit on February 5, 1943 which is not questioned. Subsequently applicant filed claim for serious and wilful misconduct of the employer. Findings and Award issued June 24, 1943 finding injury was proximately caused by the serious and wilful misconduct of the employer and award issued for an additional $2500.00.

"Employer, California Shipbuilding Corporation, now petitions for rehearing from the Findings and Award covering serious and wilful misconduct on the grounds that the evidence does not support such a finding; and, particularly that the allegations were allowed to be proved by hearsay evidence and, also, that there was no proof or knowledge of the safety orders alleged to have been violated.

"That there was no proof that violation of the Safety Orders proximately caused the injury.

"Transcript has been written at employer's request and time allowed thereafter to file points and authorities, which are now in.

"The Finding of Serious and Wilful is based on violation of Ship and Boat Building Safety Orders 6402 (which is also Labor Section 6402) and Order No.

1806, both of which were specifically pleaded. They are as follows:

> 'Section 6402. No employer shall require, or permit any employee to go or be in any employment or place of employment which is not safe.'
>
> 'Order 1806. Width of Slip Staging. (a) Slip staging shall be not less than thirty-six (36) inches wide. Planks not less than twenty-four (24) feet long shall be used whenever possible.'

"As the first Section is also a general law no proof or knowledge is required. There is an abundance of evidence particularly in the testimony of the Safety Engineer of the Industrial Accident Commission, Mr. C. W. Towt, that there was more or less continuous violation of the staging requirements by the employer (R. 96, 98, 99); that this had been taken up with the Safety Department of the employer on various occasions, without getting any results. (R. 98, 99.) That this condition had caused several deaths prior to this accident. (R. 98.)

"It would appear without serious question that the scaffold in question where the deceased fell was unsafe, having gaps in the planking (R. 76, 77, 79, 87, 95, 96, 97, 98, 99, 101, 102, 103, 105, 106, 113, 114, 142) and the planking being of insufficient width. (R. 77, 101, 102, 129.) While there is a conflict in the evidence, there appears to be substantial proof of the violations and also substantial proof of notice of existence of violations to the employer or its managing representatives.

"The accident occurred after dark.* There was no immediate eyewitness to the fall but from the evidence it appears reasonable to believe that, due to the poor lighting which was shown to have existed (R. 90), applicant fell thru one of the gaps (R. references, supra) in the planking of the scaffold over which he had to pass. From this it appears the violation was the proximate cause of the death which, in my opinion, completes the case of serious and wilful misconduct. As the decision appears to be substantially supported by the evidence, I believe the Award should stand as issued.

Disposition:

"Order denying employer's petition for rehearing.

CLELL H. MCCREDIE, Referee.

CHM:REH."

SUMMARY OF ARGUMENT.

1. The practices of the Industrial Accident Commission conform with the California constitutional and statutory provisions relating to the hearing and determination of workmen's compensation controversies.

2. The California constitutional and statutory provisions on the subject provide a method of trial and determination which affords litigants "due process of law".

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*The record shows that the accident occurred at about 7 o'clock on December 29. (R. 75, 74.)

3. The trial and determination of the particular case involved herein were conducted, both in form and in substance, strictly in accordance with constitutional and statutory requirements.

ARGUMENT.

1. THE PRACTICES OF THE INDUSTRIAL ACCIDENT COMMISSION CONFORM WITH THE CALIFORNIA CONSTITUTIONAL AND STATUTORY PROVISIONS ON THE SUBJECT.

The California workmen's compensation law was passed by the Legislature pursuant to the authority contained in Article XX, Section 21 of the California Constitution. In the opening paragraph of that constitutional section, the people of the State detailed many of the features that they desired the Legislature to place in such legislation.

More important to the case before us is the second paragraph of that section, by which the people vested the Legislature "with plenary powers, to provide for the settlement of any disputes arising out of such legislation by arbitration, or by an Industrial Accident Commission, by the courts, or by either, any, or all of these agencies, either separately or in combination, and [the Legislature] *may fix and control the method and manner of trial of any such dispute* * * *" (Emphasis added.)

The agency chosen by the Legislature to hear and determine such controversies originally, is the Industrial Accident Commission.

California Labor Code, Sections 5300, 3205.

In fixing the method and manner of trial of such disputes, as the Constitution empowers it to do, the Legislature enacted provisions permitting the Industrial Accident Commission to refer cases to referees "to try the issues in any proceeding before it, *whether of fact or of law,* and to report a finding, order, decision or award based thereon * * *" (Emphasis added.)

California Labor Code, Section 5309.

Also pursuant to its constitutional power "to provide for the settlement of any disputes arising under such (workmen's compensation) legislation" and to "fix and control the method and manner of trial of any such dispute", the Legislature provided:

> "A majority of the commission shall constitute a quorum for the transaction of business, the performance of duty, or the exercise of power of the commission. A vacancy on the commission shall not impair the right of the remaining members to perform the duties and exercise the power of the commission. The act of the majority of the commission, when in session as a commission, is the act of the commission, *but any investigation, inquiry, or hearing, which the commission has power to undertake or to hold, may be undertaken or held by or before any commissioner or any referee appointed by the commission for that purpose, and every finding, order, decision, or award made by any commissioner or referee, pursuant to such investigation, inquiry or hearing, when approved and confirmed by the commission and ordered filed in its office, is the finding, order, decision or award of the commission."* (Emphasis added.)

California Labor Code, Section 115.

It has for many years been the universal practice for referees hearing a case to prepare a memorandum or report of the evidence adduced at each hearing, and when the evidence is complete to make a recommendation to the Commission as to how the referee believes the case should be decided. That was done in this case, as has been pointed out. The reports appear in the printed record (R. 156-168) and, with the exception of two which have no bearing on the issues here, have been reproduced in this brief (pp. 4 to 15) so that it could be shown by references to the testimony that the reports truly reflected the evidence actually adduced in the case.

We respectfully submit that from the above it is clear that the practices of the Industrial Accident Commission, which were followed in this case, conform completely with the California constitutional and statutory provisions on the subject.

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2. THE CALIFORNIA CONSTITUTIONAL AND STATUTORY PROVISIONS ON THE SUBJECT PROVIDE A METHOD OF TRIAL AND DETERMINATION WHICH AFFORDS LITIGANTS "DUE PROCESS OF LAW".

It is clear from a reading of the Petition for Writ of Certiorari and Brief in Support Thereof, that petitioner's contention that it was deprived of its property without due process of law rests on its assertion that the award of the Industrial Accident Commission and the affirmance of the award by the State District Court of Appeal are contrary to the decisions of the

United States Supreme Court in the two appeals in the *Morgan* cases. (Petition, pp. 15, 19, 20, 21, 22, 23, 24, 25, 26, 29, 30, and 32.)

It is the position of the respondent Industrial Accident Commission, on the other hand, that the action of the Commission in the hearing of workmen's compensation cases is prescribed by constitutional and statutory provisions, that such provisions are designed to give due process of law to the litigants in such cases and that the particular case was heard and determined, both in form and in substance, strictly in accordance with constitutional and statutory requirements, and consequently that neither the award of the Commission nor the decision of the District Court of Appeal affirming the award are in conflict with the rulings of the Supreme Court in the *Morgan* cases.

The Industrial Accident Commission, of course, agrees with petitioner that the person or body deciding a judicial controversy must know the evidence, and that before such person or body may know the evidence there must be afforded to the litigants a full and fair opportunity to be heard on their presentation of such evidence.

The *Morgan* cases themselves, however, are authority for the proposition that the person or body making the final decision in the controversy need not hear personally all of the evidence. "Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates". "Assistants may prosecute inquiries."

Morgan v. United States, 298 U. S. 468, 481.

That is precisely what the California law permits the referee to do. That is what he did in this case. He took the evidence and formulated it in a written report which was given to the Commission which made the ultimate decision in the case. This latter step in the procedure, though held by the *Morgan* cases to be not essential to the validity of the hearing was approved by the Supreme Court as a good practice found to be of great value in proceedings before the Interstate Commerce Commission.

Morgan v. United States, 298 U. S. 468, 478.

The proposition that the deciding body need not personally hear all the evidence is also approved in *National Labor Relations Board v. Baldwin Locomotive Works,* 128 Fed. (2d) 39, 65, cited by petitioner. In citing this case petitioner called the attention of this court to the report of the Attorney General's Commitee on Administrative Procedure on page 63 of 128 Fed. (2d) 39. Although this report is quoted in the "concurring and dissenting" opinion, the judge in quoting it was actually dissenting from the action of the majority on the point with which we are here concerned. And even in that dissent he approved, on page 65, the practice of making an "intermediate report" on the mass of evidentiary material which is adduced in particular cases.

In support of its proposition that the deciding body must be familiar with the evidence, petitioner cites *State ex rel. Madison Airport Co. v. Wrabetz,* 285 N.W. 504.

As to that case we admit that petitioner has quite accurately interpreted the ruling of the Wisconsin court to be "that there is not due process of law where members of the Industrial Accident Commission assume to review an examiner's findings without reading a transcript of the evidence, *or without otherwise addressing themselves to the evidence*". (Petition, p. 28.) (Emphasis added.)

In the case at bar the Commission did, of course, address itself to the evidence as accurately summarized in the referees' reports or memoranda.

The case of *Kaegli v. Industrial Commission,* 285 N.W. 845, cited by petitioner as being in accord with the *Morgan* cases, merely confirmed the right of a party to offer proof of her allegation to the court that "no review whatever" of the evidence taken before the examiner was made by the Commission on plaintiff's petition for a review of the findings and order made by the examiner.

Admitting for the purpose of argument that petitioner may press its technical complaints as to the legal sufficiency of proceedings before the Industrial Accident Commission, it is plain that it cannot charge, as did the plaintiff in the *Kaegli* case, that the Commission made no review of the evidence taken before the referee.

In *Joyce v. Bruckman,* 15 N.Y.S. (2d) 679, four of the five members of the board who revoked a license "concededly knew nothing of the facts, on which the determination was based, excepting what they were told by the fifth member". This was held

to be improper, but such is not the situation here where all the members of the Commission were familiar wilth the evidence as summarized by the referee. Also, though holding that the action of the license board in this case was improper, this decision calls attention to that portion of the first *Morgan* decision which observed, among other things, that "Evidence * * * may be sifted and analyzed by competent subordinates".

In the case of *National Labor Relations Board v. Cherry Cotton Mills,* 98 Fed. (2d) 444, the court merely declined to enforce the board's order until an inquiry could be made as to whether or not the board had considered the case before it and based its order upon all the testimony and evidence. The court also remarked in passing: "We do not understand that it is indispensable that the Board members shall have heard the evidence delivered or shall have read it all".

The *Morgan* case is cited in *Donnelly v. National Labor Relations Board* (cited by petitioner), 123 Fed. (2d) 215, 220, as authority for the points that the Circuit Court of Appeals has the right to ascertain whether a federal administrative board has accorded a full and fair hearing to any party aggrieved by the order of the board and that all questions concerning the regularity of the proceedings before such an agency are subject to review by the federal courts. With both of these propositions we agree. However, the constitutional prohibitions against taking property without due process of law do not guarantee any

particular form of procedure; they protect substantial rights.

National Labor Relations Board v. Mackay Radio Co., 304 U.S. 333, 351.

The last case cited by petitioner to support its point that the deciding body must know the evidence is *Crow v. Industrial Commission,* 140 Pac. (2d) 321. This case held that when the person (member, examiner or referee) who held the hearings is not with the Commission when the decision is made, the record must show that the one who made the determination on the facts "had access to the benefit of his findings, conclusions and *impressions* of such testimony, by either written or *oral* reports thereof". (Emphasis added.) (In the case at bar the referee who heard the case was with the Commission when the Commission made its ultimate decision, and the Commission had before it his written report accurately summarizing the testimony.)

The court continued immediately after the matter quoted above: "This does not necessarily require that all of the Commissioners must be present at the hearing, or even that the one hearing the evidence must concur in the result * * *".

It is respectfully submitted that rather than showing that the method of hearing and determining cases before the Industrial Accident Commission of California is contrary to the provisions of the Constitution prohibiting the taking of property without due process of law, the authorities cited by petitioner, including the two decisions in the *Morgan* case

indicate that the method provided by California law for the trial and determination of workmen's compensation cases does afford a full and fair hearing to the parties.

As pointed out on page 32 of the petition, the California courts of last resort have held that the method provided by California law for the trial and determination of industrial accident cases does provide due process of law when that method is properly applied.

Taylor v. Industrial Accident Commission, 38 Cal. App. (2d) 75.

Petitioner finds fault with the *Taylor* case on the ground that under the rule which it lays down both the Commission and the referee may be "wrong"; that is, the Commission may without hearing or reading a complete transcript of the evidence approve the decision of a referee even when it is "wrong". Petitioner thus overlooks the principle that the power to decide necessarily carries with it the power to decide wrongly as well as rightly.

21 *C.J.S.* (*Courts* § 27), pp. 38, 39.

Under the California constitutional section the Legislature could have provided a method of trial and determination which did not contain any provision for rehearing by the Industrial Accident Commission, without violating the due process clauses of the Constitution. All that is required is a full and fair hearing and this is afforded by the method provided for by California law.

In addition to the *Taylor* case cited by petitioner, we respectfully call this court's attention to the reasoning of the California courts in *Darling v. Industrial Accident Commission* (Dec. 14, 1944), 67 Advance Calif. Appellate 339, as well as the reasoning of the State District Court of Appeal in the present case.

---

3. THE TRIAL AND DETERMINATION OF THE PARTICULAR CASE INVOLVED HEREIN WERE CONDUCTED, BOTH IN FORM AND IN SUBSTANCE, STRICTLY IN ACCORDANCE WITH CONSTITUTIONAL AND STATUTORY REQUIREMENTS.

The reports on memoranda of the referee and reviewing referee on the evidence in the case have been set forth herein on pages 4 to 15, supra.

An analysis of these reports, clause by clause, shows that every statement in them is based on the record. Petitioner does not call attention to any evidence in the record which was omitted from the reports.

Petitioner does quote (Petition, p. 8) from the opinion of the State District Court of Appeal which is under attack, a statement that "the report did not include a summary of the evidence". It should be emphasized that the report to which the court was then referring was that of the *reviewing* referee as distinguished from the trial referee. The referee who heard the witnesses in the case made a very complete and very accurate summary of their testimony. See pages 4 to 12, supra.

Also, as the court remarked, while the report of the reviewing referee did not contain a summary of the

evidence, since that had been done by the man who heard the evidence, "*it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were established by the evidence* * * *". (Emphasis added.)

Further on, the petition states that the reports were inadequate to show the proximate cause of the death. A mere glance at the reports indicates that the proximate cause of the death was that the employee walked off the end of a scaffold which was required to be guarded but which was not, though the defects had been called to the attention of the employer's representatives many times. The testimony indicated this to the referee. His report, accurately summarizing the testimony, indicated it to the Commission. The Commission decided the case in accordance with the evidence.

It it therefore respectfully submitted that the hearing and determination of the case were in strict accord with constitutional requirements.

For the foregoing reasons it is respectfully urged that the petition for writ of certiorari be denied.

Dated, San Francisco, California,
January 22, 1945.

EVERETT A. CORTEN,
Attorney for Respondent,
Industrial Accident Commission of the State of California.

Due service and receipt of a copy of the within is hereby admitted

this.....day of January, 1945.

_____

_____

Attorneys for Petitioner.

Office - Supreme Court, U. S.
FILED
FEB 10 1945
CHARLES ELMORE CROPLEY
CLERK

(23)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 673

CALIFORNIA SHIPBUILDING CORPORATION (a corporation),

Petitioner,

vs.

INDUSTRIAL ACCIDENT COMMISSION OF THE STATE OF CALIFORNIA and BELLE REBECCA GADDIS,

Respondents.

PETITIONER'S REPLY BRIEF.

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Respondents.

PETITIONER'S REPLY BRIEF.

Petitioner files this reply for the purpose of attempting to clarify the nature of the issues that have been developed by the petition for writ of certiorari and brief in support thereof on the one side and the brief for respondent on the other.

JURISDICTION.

Respondents concede that the questions presented are within the jurisdiction of the Supreme Court of the United States (Brief for Resp., p. 2). They content themselves, though, with the contention that the practices followed by the California Industrial Accident Commission conform with the controlling standards of procedural due process of law (Brief for Resp., pp. 18-25).

ARGUMENT.

I.

PETITIONER'S ATTACK WAS NOT UPON THE METHOD OF DETERMINATION PROVIDED FOR BY THE CALIFORNIA STATUTES, BUT UPON THE MANNER IN WHICH THE INDUSTRIAL ACCIDENT COMMISSION HAS COMPROMISED THAT METHOD ON THE GROUND OF EXPEDIENCY.

Respondents devote much of their brief (pp. 16-25) to the argument, made with great conviction, that the California statutes establishing a system of workmen's compensation insurance contain ample procedural safeguards to assure litigants that they will receive that fair and full hearing guaranteed them by the Fourteenth Amendment. The position of respondents is epitomized in their statement that:

> "All that is required is a full and fair hearing and *this is afforded by the method provided for by California law.*"*
>
> (Brief for Resp., p. 24.)

---

*Emphasis throughout is ours.

Petitioner made no general criticism of the adequacy of "the method provided for by California law". Our attack was upon the routine, casual way in which a litigant's rights are disposed of by the hearing referees, "reviewing referees", "monitors" and other forms of supernumeraries who have arrogated unto themselves judicial duties and functions which the California statutes expressly require shall be discharged by the Industrial Accident Commission itself.

The California "Workmen's Compensation, Insurance and Safety Act of 1917" (*California,* Stats., 1917, p. 831) was one of the pioneer compensation insurance laws. Modified from time to time, it has remained one of the most progressive of such laws throughout the nation. We sought no quarrel concerning the structure of the California law, conceding that within its framework there are ample provisions by which hearings could be so devised and conducted as to afford procedural due process of law to every litigant.

Our charge is that the respondent Industrial Accident Commission has compromised beyond reason or right with the most fundamental requirements of due process of law. The compromise is excused and apologized for upon the familiar grounds of expediency and an ever-increasing burden of administrative duties. Over a period of twenty-eight years this compromising has increased progressively until in recent years the attempt to comply with even the barest rudiments of due process has been of the most routine nature.

Specifically, the very basis of our petition is that, conceding that "the method provided for by California law" (as respondents refer to it) establishes a method of trial and determination which could afford to litigants due process of law, the carrying out of that method was abortive in the proceeding here being subjected to scrutiny, and the subterfuges resorted to in the interest of expediency so compromised petitioner's rights as to constitute a denial of due process of law.

The method of procedure authorized by the California statutes was sufficient to have afforded us due process of law. The respondent Industrial Accident Commission and its large staff were well aware of the legal precedents that marked out the limits within which their proceedings should have been guided so as to meet the test of due process. That they had no difficulty in understanding the true rules is indicated by the carefully phrased discussion of what constitutes procedural due process of law, as set out at pages 18-25 of their brief.

Thoroughly grounded in the proper limitations of administrative procedure, the California Industrial Accident Commission has established a procedure that it knows to be short of the requirement of due process of law. Its disregard of fundamental legal concepts in this instance is as flagrant as Mr. Justice Ward of the California District Court of Appeal recently found it to be in another field, when he stated in his concurring opinion in

Pacific Employers Insurance Company v. Industrial Accident Commission (1944), 65 A.C.A. 901, 905:

"The commission knows the rule to follow. However, it is that body's view that the commission is right and the courts are wrong. Instead of following the previous court decisions, and permitting the applicant to appeal, the commission has granted an award, thereby forcing the employer or its representative to appeal. *This action permits the applicant and respondent commission to rest comfortably upon the findings and the rule that the determination of the commission on questions strictly of fact is final and not subject to judicial review."*

II.

WHETHER PETITIONER WAS AFFORDED DUE PROCESS OF LAW DEPENDS UPON A CONSIDERATION OF THE MANNER IN WHICH THE MEMBERS OF THE INDUSTRIAL ACCIDENT COMMISSION CONSIDERED AND DETERMINED THE VITAL ISSUE OF PROXIMATE CAUSE.

The vital issue in the proceeding before the respondent Commission was that of proximate cause:

Was the death of Jonas Dulpha Gaddis proximately caused by the alleged act of serious and wilful misconduct on the part of the employer?

It was to that question that the members of the Commission should have directed their inquiry. It was the evidence on that issue that they should have considered and weighed if their conclusion was truly

to be their own independent, conscientious determination.

How well were they able to discharge that obligation? In the specific proceeding, even in light of the "method provided for by California law", in what form and to what extent did they have the testimony available to them for an appraisal and consideration?

It is upon the basis of the answers to those questions that this proceeding must be decided, rather than a wordy discussion of well-understood legal precedents.

Throughout the entire proceedings petitioner has urged that there was no proof of the proximate cause of the death of Gaddis, the employee. We urged that point before the respondent Commission at the earliest opportunity, being upon the filing of the "Petition for Rehearing" (Rec. p. 152). We urged it upon the California District Court of Appeal in our "Points and Authorities Filed in Support of Petition for Writ of Review" (Rec. pp. 9, 19-23). Again, in the "Points and Authorities in Support of Petition for Hearing in the Supreme Court" it was presented (Rec. pp. 192-199).

Our claim that the record was devoid of any satisfactory or substantial proof of the proximate cause of the injury raised a question of fact which, though simple and clear-cut, involved a determination upon an issue in which the scales were very evenly balanced. The situation called for a careful weighing of the evidence before a determination was reached.

The opinion of the District Court of Appeal treats of this contention so as to make it obvious that it was

impressed with the closeness of the question and the need for careful analysis and appraisal of the evidence before reaching a determination and conclusion. That is apparent when one reads the following portion of the opinion:

> "*As we view it, the Commission was required to determine first whether Gaddis fell either in attempting to cross over to the ladderway on his way to the ground or while attempting to return to his work.* All of the circumstantial evidence, and such direct evidence as there was, points to the conclusion that he fell from some point within 20 feet of the ladderway. In crossing that section he would have had to walk on a single plank, or if none was there, climb down five or six feet to the fifth level. *It is doubtful how he was attempting to negotiate the crossing* but there is no doubt that whichever course he took was made necessary by the unfinished condition of the platform. *It is possible that Gaddis may have fallen from the ladderway or from the fifth level after he had reached it in safety,* but the probabilities strongly support the implied finding of the Commission that he fell from a place where the platform was unfinished, and not from some place that was not unsafe or dangerous. But even if other inferences could reasonably be drawn as to the place from which he fell, we are bound to accept the inference which the Commission drew if it is a reasonable and logical one. We regard it as more reasonable than any of the other possible inferences suggested by petitioner or by the proven facts.
>
> *If it is accepted as a fact, satisfactorily established by the evidence, that Gaddis fell while attempting to cross where the sixth level platform*

> *was unfinished,* it is entirely logical to conclude that the immediate cause of his fall was the absence of a completed platform. *This is only to say again that it is more reasonable to believe that he fell while attempting something difficult and dangerous than to believe that he fell after he had safely reached the ladderway or the completed platform on the fifth level.* We find no reason to question the soundness of the finding that the direct and proximate cause of the accident was the violation of the safety order by the employer."
>
> (Rec. pp. 171-172.)

While petitioner does not agree with the conclusion of the justices of the District Court of Appeal we cannot complain of the method by which they reached it. The complete transcript of testimony taken before the respondent Commission was available to the justices, they had heard oral argument on the case, and it is obvious that they personally sifted the evidence and weighed it before reaching their determination.

The same was not true of the respondent Commission's deliberations, if any. They did not have the transcript of the testimony available and no oral argument had been presented. Their sole source of information was the reports of the hearing referee.

III.

RESPONDENTS PREDICATE THEIR ENTIRE CAUSE UPON THE FACT THAT THE MEMBERS OF RESPONDENT COMMISSION HAD AVAILABLE TO THEM THREE REPORTS PREPARED BY REFEREES, BUT THEY FAIL TO POINT OUT WHEREIN ANY OF THE REPORTS CONTAIN ANY STATEMENT OF THE EVIDENCE ON THE CONTROLLING ISSUE.

Stripped of all of its non-essential trappings, respondents' only reply to the petition for writ of certiorari is found in the less than two-page statement set forth at pages 25-26 of their brief.

They contend that the determination of the proceeding here involved was "conducted, both in form and in substance, strictly in accordance with constitutional and statutory requirements".

Respondents' sole attempt to justify the sufficiency of the inquiry pursued by the members of the Industrial Accident Commission rests upon their claim that the Commission considered certain reports prepared by the hearing referee. Their position is stated as follows:

> "After each hearing was held *the referee who presided formulated a report on the evidence adduced at the hearings* which report was dictated by the referee to a stenographer, typewritten by her, and *considered by the Commissioners of the Industrial Accident Commission before the ultimate decision of the Commission was made in the case.*"
>
> (Brief for Resp., p. 3.)

Petitioner respectfully submits that the nature of respondents' real answer exposes the complete weak-

ness of their position. Brevity may ordinarily be a potency in a legal brief, but certainly the vague, inconclusive statements assembled on pages 25-26 of the brief for respondents are no sufficient answer to the fundamental question raised by the petition for writ of certiorari.

The question here presented involves the right of an administrative board to render a decision that amounts to a judicial determination without having either heard or read the evidence, under such circumstances that its only source of information as to the nature of the evidence is what may have been conveyed to it orally by its assistants or "monitors" who did not themselves hear or read the transcript of the evidence, and who in turn had available to them nothing more than a brief written report of the hearings, which report did not contain a summary of the evidence on the vital and controverted issues of fact, but merely listed a resume of the ultimate conclusions and findings of the person who conducted the hearing.

An analysis of respondents' reply discloses that they concede that:

(1) The Industrial Accident Commission members did not hear the case themselves;

(2) The Commission members did not have a transcript of the testimony available when they decided the case;

(3) The Commission members did not discuss the details of the evidence with the referee who heard the case;

(4) At best, the Commission members read or had reported to them certain brief reports of the hearings.

Petitioner concurs in respondents' claim that:

> "The *Morgan* cases themselves, however, are authority for the proposition that the person or body making the final decision in the controversy need not hear personally all of the evidence." (Citing *Morgan v. United States,* 298 U.S. 468, 481.)

Conceding that, where subordinates have taken evidence and prosecuted inquiries there still remains the requirement stated in the identical opinion immediately following the portion cited by respondents, that:

> "There must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred."

That rule required that the California Industrial Accident Commission *consider and appraise the evidence* in the proceeding involved here. The members of the Commission were required to address themselves to the evidence, and upon that evidence they were required to reach their independent and conscientious conclusion justified by the evidence.

The manner of that inquiry and the true nature of the Commission members' consideration of the evidence is the real test of whether or not, in spite of its measured method, the California statute provides but the hollow mockery of a "full and fair hearing".

The crux of this proceeding, and the question that must be answered, is:

> *Did the hearing referee's reports in truth set forth any sufficient statement of the evidence on the vital issue, so that one who read them alone could base an independent conclusion thereon?*

Petitioner charges that they did not, and bases its application for a writ upon that charge.

To quote the reports at length (as respondents do at pages 4-15 of their brief) without indicating where the vital evidence appears, is no sufficient answer.

To claim that "every statement in them is based on the record" (as respondents do at page 25 of their brief) is no sufficient answer to the charge that the statements, even if true, are inadequate.

To state blandly that "a mere glance at the reports indicates that the proximate cause of the death was that the employee walked off the end of a scaffold" (as respondents do at page 26 of their brief) is but a mild effort to resist petitioner's contention that "the memorandum of the hearing referee is wholly devoid of any reference to the issue of proximate cause" (Petition for Writ of Certiorari, p. 13).

Respondents do no more! That is their reply.

IV.

NONE OF THE THREE REFEREES' REPORTS, WHICH IT IS CONCEDED WERE THE ONLY SEMBLANCE OF A STATEMENT OF THE EVIDENCE AVAILABLE TO THE MEMBERS OF RESPONDENT COMMISSION, CONTAINED ANY SUMMARY OR STATEMENT OF THE EVIDENCE SUFFICIENT FOR THEM TO BASE THEIR OWN INDEPENDENT DETERMINATION THEREON.

Respondents assert, with some showing of assurance, that:

> "* * * *a mere glance at the reports* indicates that the proximate cause of the death was that the employee walked off the end of a scaffold."
> (Brief for Resp., p. 26.)

Petitioner would suggest respectfully that the members of the Industrial Accident Commission are so steeped in the practice of deciding cases on the basis of "a mere glance at the reports" that they fail to apprehend that the rudiments of due process of law require them to do more.

Had they studied the reports with meticulous care in this proceeding it would have been to no avail.

Nowhere in the referees' reports is there to be found any fair summary or résumé of the evidence, particularly on the vital issue of proximate cause. Respondents have not directed the Court's attention to the portion of the reports claimed by them to set forth an accurate summary of the testimony. The reason is obvious: There is no such summary or statement of the evidence in any of the reports.

Mr. Justice Shinn and his associates on the California District Court of Appeal expressly found that the report of the rehearing referee did not include a summary of the evidence. Their opinion so stated:

> *"While the report did not include a summary of evidence, it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were established by the evidence, and it stated as an ultimate fact that the employee's fall resulted proximately from the defective staging."*
>
> (Rec. p. 175.)

The same defect is apparent in each of the other two memoranda upon which respondents predicate their entire cause.

The three referees' reports that respondents rely upon are printed at length at pages 4-15 of the brief of respondent. That the Court may be informed of the circumstances under which each of them was prepared, that attention may be focused upon those portions that appear to attempt to present the issue of proximate cause, and that the weaknesses and defects of each may be more easily exposed, petitioner undertakes the following summary.

(1) The "memorandum on hearing on amended application on serious and wilful misconduct". (Brief for Resp. pp. 4-6; Rec. pp. 165-168.)

This report was dictated by Claud M. Dunn, the hearing referee, on March 8, 1943, the day on which the first hearing on the issue of serious and wilful misconduct had been held.

Referee Dunn was attempting to make a record of the proceedings before him. Petitioner submits that a fair examination of the report will disclose that the following is the full extent of the statements concerning proximate cause:

> "Testified it happened at 7 o'clock. That there were lights there but due to the dimout they couldn't be very bright. That the deceased told him about 7 p.m. that he was going to get a drink and the witness saw him walk down the plankway toward the stairs which was a distance of about 48 feet, the last 16 or 20 of which was the area of the walkway left open by the failure to carry the planks on across."
>
> (Brief for Resp., p. 5; Rec., p. 166.)

(2) The "memorandum on further hearing and decision". (Brief for Resp. pp. 7-12; Rec. pp. 161-165.)

This report was dictated by the same hearing referee, Claud M. Dunn, on the day of the second hearing. Again, he was trying to prepare a statement of the proceedings before him.

Petitioner believes that a fair, but careful, reading of the report will show that the full extent of the statements on the issue of proximate cause are these:

> "It will be noted in that statement that Morkal, who had previously testified as a witness, stated that after deceased left him with the statement he was going to get a drink it was not more than two or three minutes before information was relayed to the effect that the deceased had fallen."
>
> (Brief for Resp., p. 11; Rec., p. 164.)

(3) The "memorandum on order denying employer's petition for rehearing". (Brief for Resp. pp. 13-15; Rec. pp. 157-159.)

This report was prepared by Clell H. McCredie, who is denominated a reviewing referee or rehearing referee. When a litigant asserts that an original decision of the Commission is in error the statute allows him to file a petition for a rehearing. Instead of actually conducting a full hearing themselves, or even reading such petitions in their entirety, the members of the Commission follow the practice of referring them to one of their referees assigned to rehearing work. That referee then prepares a report which is either read by the Commission, or, more likely, briefly reported to them. On the basis of such a brief report they proceed to determine the rights of litigants.

McCredie was the reviewing referee in the Commission's Los Angeles office. If any member of the Commission's staff actually read the "Petition for Rehearing" it was he. It was of this report that the District Court of Appeal found:

> "The commissioners' order denying a rehearing was based upon this report and recommendation."
>
> (Rec., p. 175.)

A studied analysis of the report will convince one that, as the District Court of Appeal held:

> "* * * The report did not include a summary of the evidence, it did state generally the facts as to the condition of the staging and the circumstances of the accident, which were estab-

> lished by the evidence, and it stated as an ultimate fact that the employee's fall resulted proximately from the defective staging."
>
> (Rec., p. 175.)

General statements concerning the conditions of the staging, vague references to the nature of the lighting conditions, ultimate conclusions of the referee, and all such generalized narrative matter, though occasionally interesting, are not helpful in making it possible for the trier of fact to base his independent judgment thereon and still maintain the pretense of having sifted and weighed the evidence.

Divested of all surplusage, the following is the only statement in this final report that even remotely relates to the issue of serious and wilful misconduct:

> "The accident occurred after dark. There was no immediate eye witness to the fall but from the evidence it appears reasonable to believe that, due to the poor lighting which was shown to have existed, applicant fell thru one of the gaps in the planking of the scaffold over which he had to pass. From this it appears the violation was the proximate cause of the death which, in my opinion, completes the case of serious and wilful misconduct." (Brief for Resp. p. 15; Rec. p. 159.)

The report states that: "*from the evidence* it appears reasonable to believe * * *"

From what evidence? Where is the statement of it? Is the determination of an evenly balanced question of fact to be made on that kind of a statement?

If so, then has there been a hearing in a substantial sense within the meaning of the *Morgan* decision (supra)? Can it be said that the officer charged by statute with the responsibility of making the determination has considered and appraised the evidence?

Based upon that report and recommendation the members of the Commission denied a rehearing. Considering its defects and omissions petitioner urges that particularly apropos is the language of another division of the California District Court of Appeal in *Boswell v. Industrial Accident Commission* (1944), 67 A. C. A. 390, 398, when it stated:

> *"We feel confident that not one of the commissioners would have voted against a rehearing in this matter if he had read the full transcript of the proceedings."*

V.

A COMMITTEE OF THE CALIFORNIA LEGISLATURE, APPOINTED TO REAPPRAISE THE FUNCTIONING OF THE INDUSTRIAL ACCIDENT COMMISSION, HAS FOUND THAT THE COMMISSION'S COMPROMISE WITH THE REQUIREMENTS OF DUE PROCESS OF LAW IS THE GENERAL RULE.

Petitioner's protest against the California Industrial Accident Commission's compromise with expediency is not based upon any rare instance or an isolated slip-up on the part of a normally orderly functioning administrative agency.

The respondent commission has so generally operated beyond the pale of due process that approxi-

mately one year ago the California legislature ordered a searching investigation of its processes. The probability that litigants appearing before the Industrial Accident Commission were being deprived of procedural due process of law by reason of its constantly increasing volume of business, and the confusion resulting from a commingling of judicial functions with complicated administrative duties, was recognized by the legislature of California. On January 31, 1944 the assembly adopted unanimously House Resolution No. 58, requesting the Assembly Interim Committee on Governmental Efficiency and Economy to study the procedure of the Industrial Accident Commission. Relevant portions of the resolution stated:

> "Whereas, The industrial development of the State and the increased volume of the work performed by the commission have suggested a *reappraisal of the manner in which the procedure and functioning of the Industrial Accident Commission is affording due process of law and a substantial hearing to all persons appearing before it;* * * * therefore, be it
>
> Resolved, That *this Assembly recommends that there be a reappraisal of the manner in which, under present conditions, the organization and administrative set-up of the Industrial Accident Commission makes it possible to afford due process of law to persons appearing before it.*" (*California* Legislature, Assembly Daily Journal, 3rd Extra Session, 1944, page 139.)

Only a week ago the preliminary report of the legislative investigating committee was filed. It substan-

tiates in every respect, and finds to be a general procedure, every bad practice that petitioner has complained of in the proceedings here involved.

With respect to the charge that the members of the Commission do not in fact weigh and consider the evidence, and that consideration is of the most cursory and routine fashion, the report found:

> "The length and number of sessions of the commission at which cases are determined were referred to herein (approximately two hours, two days a week, at which approximately 100 causes are determined).
>
> "Prior to a commission meeting the monitor, referred to, will, in a short space of minutes, read the report of the trial referee and draw such conclusions therefrom as he believes the issues and facts warrant. To this reaction will be added his view of what the facts and law ought to be in this or similar cases. These views and reactions are then related to the commission and, for the most part, a determination is made thereon. *In the words of one commissioner, referring to type of cases, 'It just goes through like greased lightning'.* The monitor described the exercise of decisional power by the commission thus:
>
> 'Question: Do you think there is any denial of due process in that procedure?
>
> Answer: I do not, for this reason, that *the commission's work is so vast that they have to approve certain actions by the referee—if you will pardon the terminology—blind. They simply cannot go over the individual cases. Any review that is made is just that much better than a blind ap-*

proval.'" (*California* Legislature, Assembly Daily Journal, January 27, 1945, pp. 56-57.)

Finding that the denial of procedural due process of law, of which petitioner complains, is the general rule, the committee's report concludes:

"'Due process of law' can not be compromised on grounds of convenience, expedience or the desire to rid the commission of harassing delay, when the minimal constitutional requirements are either omitted or ignored. One is at a loss to find any authority supporting a conclusion that because the commission, or commissioners, are burdened with other, various and onerous duties that it is, or should be, excused from the constitutional requirement of granting unto each litigant a review of the evidence in a substantial manner. It is clear that having done that there should be no reluctance in making such fact known to the courts.

In the 30 years—which is short in the span of legal procedure—*the commission has been forced, in order to get out its decisions, to temporize and to adopt expedients; but the time has come when the criticism is too general to be overlooked. Expedients result in practical compromises in disregard of judicial procedures. It has, however, been the rule.* * * *

"Procedural due process of law is not a game. It is the life blood of justice under law." (*California* Legislature, Assembly Daily Journal, January 27, 1945, p. 59.)

The legislative report referred to was based upon a lengthy transcript of testimony taken at hearings at

which members of the respondent Commission, reviewing referees, hearing referees, attorneys practicing before the Commission, litigants and others testified. Undoubtedly legislative reforms will follow.

Litigants' rights may be expected to be protected in the future by express direction of the legislature.

Petitioner's right to due process of law is dependent upon a proper exercise of the power of the judicial branch of government. Our petition for writ of certiorari sought that protection.

For the reasons stated the writ of certiorari should be granted to review this decision of the District Court of Appeal of the State of California, Second Appellate District, Division Three.

Dated, San Francisco, California,
February 7, 1945.

Respectfully submitted,
MAX THELEN,
GORDON JOHNSON,
Counsel for Petitioner.